

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

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Accelerating Wireline Broadband
Deployment by Removing
Barriers to Infrastructure Investment

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WC Docket No. 17-84

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**COMMENTS OF LUMOS NETWORKS INC., LUMOS NETWORKS OF WEST
VIRGINIA INC., AND LUMOS NETWORKS LLC**

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Accelerating Wireline Broadband
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WC Docket No. 07-245

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**COMMENTS OF LUMOS NETWORKS INC., LUMOS NETWORKS OF WEST
VIRGINIA INC., AND LUMOS NETWORKS LLC**

Lumos Networks Inc., Lumos Networks of West Virginia Inc., and Lumos Networks
LLC (collectively “Lumos”), by their attorneys, hereby file these comments in response to the

FCC’s Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment in the above-referenced docket.¹

I. INTRODUCTION AND SUMMARY

As the Commission has correctly acknowledged in this proceeding, it is now more than ever critically important to remove artificially imposed barriers to infrastructure investment so that facilities-based providers of broadband services can build, maintain, upgrade and expand their existing fiber networks. As a leading fiber based telecommunications provider in the Mid-Atlantic region, Lumos presently has a total of 10,907 fiber route miles/503,616 total fiber strand miles located in Virginia, West Virginia, Pennsylvania, Maryland, Ohio, North Carolina and Kentucky. In addition, Lumos has over 3,400 total “on-net” locations and over 100,000 locations that are considered “near net” or located within one-half mile of our fiber network.

In order to facilitate the deployment of fiber optic facilities necessary for the provision of broadband services, Lumos is oftentimes dependent on the timely processing of pole attachments. Because it is not efficient or in some cases even possible for providers of broadband services to deploy their own poles, Lumos is oftentimes dependent on pole attachments placed on incumbent local exchange carrier (“ILEC”) and/or electric utility poles. However, the process of gaining timely access to ILEC and/or electric utility poles on reasonable terms and conditions has historically been a challenge. These challenges have in large measure

¹See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37 (Apr. 21, 2017) (“NPRM”).

been occasioned because ILECs and/or electric utilities have traditionally lacked the incentive to provide access to poles on reasonable terms and conditions.

On April 7, 2011, the FCC unanimously adopted an order that comprehensively overhauled its pole attachment rules.² Among other things, the *2011 Pole Attachment Order* spelled out more specific rights and obligations for pole owners and attachers regarding access, including the establishment of a four-stage timeline to govern most steps of the pole attachment application and make-ready processes for both wireline and wireless attachments.

With respect to the completion of the engineering survey, for example, the FCC retained and refined rule 47 C.F.R. § 1.1403(b) requiring pole owners to respond in detail to "complete" requests for access to poles within 45 days; along with the requirement that any denial of an application request must include a written explanation of the specific capacity, safety, reliability or engineering concern on which the pole owner based its denial.

The *2011 Pole Attachment Order* also required pole owners to tender an estimate of make-ready charges to potential attachers within 14 days of receiving the results of the engineering survey, and similarly allowed applicants 14 days to accept a tendered estimate of make-ready charges and provide payment. Once estimated make-ready charges had been paid by the attacher, pole owners were required to complete required make-ready work within 60 days (with exceptions for large orders or for "good and sufficient cause," such as emergencies requiring federal disaster relief). If make-ready was not subsequently completed within 60 days,

² *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5252, paras. 22-23 (2011) (*2011 Pole Attachment Order*).

a pole owner (prior to the expiration of the 60-day period) had to notify the attaching party that it intended to complete all remaining work within 15 days. In such cases, the pole owner had an additional 15 days to complete make-ready. If the work was still unfinished at the end of the 15-day extension, then the attacher could assume control of make-ready and hire an approved contractor to complete the remaining work. In this regard, pole owners are required to make available a list of contractors authorized to perform surveys and make-ready work in the communications space.

Without question, the four-stage timeline adopted in the *2011 Pole Attachment Order*, coupled with the ability to hire an approved contractor to complete delinquent engineering survey and make-ready work, was a tremendous step in the right direction toward improving competitive access to ILEC and electric utility poles. That said, there is still ample room for improvement, and Lumos is very much in favor of the timeline reductions being considered by the FCC in this proceeding.³ The streamlining of the current four stage timeline being proposed by the FCC, if ultimately adopted, will have a significant positive effect on the extent to which facilities-based service providers like Lumos are able to efficiently expand the deployment of broadband service to its customers.

II. THE FCC’S PROPOSED REVISIONS TO THE APPLICATION REVIEW AND SURVEY PERIODS ARE REASONABLE AND SHOULD BE ADOPTED.

³ It worth noting that in the *2011 Pole Attachment Order* the FCC acknowledged that the four-stage timeline was established as a maximum, and that necessary work could often proceed more rapidly, especially at the estimate and acceptance stages, or for relatively routine requests. Moreover, the FCC stated that “it would not be reasonable behavior for a utility to take longer to fulfill any requests simply because a timeline with maximum timeframes is being adopted.” See *2011 Pole Attachment Order* at Paragraph 23.

Under the FCC's current rule, 47 C.F.R § 1.1403(b), a utility is required to grant access to poles and conduit within 45 days of receiving a request for such access. In its NPRM, however, the FCC inquired as to whether it should require a utility to review and make a decision on a completed pole attachment application within a timeframe shorter than the current 45-day period.⁴ Indeed, the FCC asked rhetorically in the NPRM whether a 30 day, or perhaps even a 15 day timeframe as presented in the revised language of § 1.1403(b) in Appendix A, would be a reasonable one for utilities to act on a completed pole attachment application.⁵

After thoughtful consideration of the FCC's proposed timeframe reductions, Lumos agrees with the proposition that a timeframe shorter than the current 45 days is abundantly reasonable for utilities to act on a completed pole attachment application, especially with respect to smaller or more routine attachment requests, which should require a far lesser period of time to complete than the currently allotted 45 days. Perhaps a graduated timeframe that would allow 15 days for projects involving fewer than 100 poles, 30 days for projects involving fewer than 500 poles, and the retention of the current 45 day timeframe for projects involving more than 500 poles would be a reasonable compromise and would serve the interests of both the pole owner and the prospective attacher.

Regardless of the timeframe(s) ultimately adopted by the FCC for completion of the engineering survey, however, it is absolutely critical that the FCC preserve the ability of

⁴ See *NPRM* at Paragraph 8.

⁵ *Id.*

attaching entities to engage outside contractors to complete the engineering survey if the pole owner fails to do so. Indeed, in the case of the application evaluation and engineering survey, Lumos recommends that if the pole owner fails to respond to a requested application and/or complete the necessary engineering survey within the designated timeframe, whether that timeframe be 15 days, 30 days or 45 days, the attaching entity should be able to hire the third party engineering contractor to either approve or deny the pending application based upon applicable engineering standards like the National Electrical Safety Code (NESC). If the application involved should then be confirmed, Lumos would further recommend that said third party engineering contractor then be empowered to provide a good faith estimate of all make-ready costs that may be associated with the underlying application.

In addition, Lumos would fully support the implementation of new rules permitting new attachers to perform make-ready work in lieu of the pole owner or existing attacher performing such work, especially in situations in which the required make-ready work is routine or commonplace.⁶ Allowing the new attacher to perform such make-ready work would undoubtedly save time over the current FCC prescribed timeframe, would reduce make-ready costs substantially, and would ensure the consistency and reliability of the new attacher's network across multiple deployments.

Although the NPRM notes potential concerns involving safety, facility integrity, or the prospect of third-party access resulting in unqualified workers compromising the pole owner's

⁶ See *NPRM* at Paragraph 18.

networks,⁷ Lumos does not anticipate significant difficulties being encountered. To begin with, pole owner's own practices demonstrate that use of third-party contractors is a widespread and common practice, and in addition to the generally accepted industry standards that would be applicable to such outside contractor activity, pole owners would also be free to establish reasonable complimentary standards for those working on its poles. Finally, if there is information about poles and facilities to which only the pole owner has access, the pole owner can obviously share that information with the qualified third-party contractor. Presumably, pole owners that rely on third-party contractors for their own work do this already.

III. THE PROPOSED REVISION TO THE COST ESTIMATE PERIOD IS REASONABLE AND SHOULD BE ADOPTED BUT THE CURRENT PERIOD FOR ACCEPTANCE OF SAID COST ESTIMATE SHOULD BE MAINTAINED AS IS.

Under the FCC's current rules, 47 CFR § 1.1420(d), where an application request is not denied, a pole owner is required to present an estimate of charges necessary to perform all necessary make-ready work within 14 days of providing a response to such application in accordance with § 1.1420(c). In turn, the attaching entity under 47 CFR § 1.1420(d)(1) and (2) essentially has another 14 day period in which to accept the make-ready cost estimate. In its NPRM, however, the FCC inquired as to whether it should require a timeframe for these steps that is shorter than the combined 28 day period or perhaps combine them into a condensed 14 or 10 day period.⁸

⁷ See *NPRM* at Paragraph 18.

⁸ See *NPRM* at Paragraph 10.

Based upon its experience, Lumos is of the opinion that while a reduction in the current 14 day timeframe for the production of a cost estimate to 7 days is reasonable, a corresponding reduction in the current 14 day timeframe for acceptance of the cost estimate is not. Because Lumos carefully scrutinizes all pole attachment cost estimates in order to determine their reasonableness, and if necessary, endeavors to meet with the pole owner in an effort to negotiate estimated costs down to a more acceptable level, Lumos believes that a reduction in the current 14 day acceptance period is not advisable at this time. In its experience, Lumos normally needs every one of those 14 days currently allotted to properly evaluate and finalize cost estimates associated with its pole attachment applications.

IV. THE PROPOSED REVISION TO THE MAKE-READY PERIOD IS REASONABLE AND SHOULD BE ADOPTED. IN ADDITION, ATTACHERS HAVING TO UTILIZE OUTSIDE CONTRACTORS TO COMPLETE MAKE READY WORK SHOULD BE ELIGIBLE FOR A REFUND OF MAKE-READY COST PAYMENTS MADE IN ADVANCE TO POLE OWNERS.

In the NPRM, the FCC sought input on approaches to shorten the make-ready timeframe. At present, pursuant to 47 CFR § 1.1420(e)(1)(ii), pole owners are required to give existing attachers a period not to exceed 60 days after the make-ready notice is sent to complete work on their equipment in the communications space of a pole. In the NPRM, the FCC also noted in the *2011 Pole Attachment Order* it recommended as a “best practice” a make-ready period of 30 days or less for small pole attachment requests and 45 days for medium-size requests.⁹

⁹ *2011 Pole Attachment Order* at Paragraph 32.

Consequently, the NPRM inquires as to whether the FCC should now formally adopt the aforementioned “best practices” timeframes set forth in the *2011 Pole Attachment Order*.

Probably more so than any other aspect of the pole attachment application process, the issue of both the validity of make-ready costs and the timely completion of necessary make-ready work have been the most contentious in Lumos’ experience. Prior to the *2011 Pole Attachment Order*, there was no timeframe specified in the FCC’s rules governing the completion of make-ready work. As a result, pole owner completion of make-ready work became a time consuming and arduous process that in some cases took between 4-6 months or sometimes longer to complete, if it was completed at all -- which was especially frustrating given the fact that Lumos has paid in advance for the timely completion of this work. By comparison, ILECs and electric utilities continued to act much more quickly when installing their own facilities, thereby achieving an unfair and undeserved competitive advantage over Lumos, which would have undoubtedly continued but for the reforms contained in the FCC’s *2011 Pole Attachment Order*.

The FCC’s *2011 Pole Attachment Order* established firm timelines for the completion of make-ready work, and provided attachers with the ability to utilize outside contractors to complete the make-ready if the pole owner did not. Although Lumos only attempts to utilize outside contractors to complete survey or make-ready projects as a last resort, it has indeed utilized this option to great effect on multiple occasions.

Prior to being able to exercise self-remedy, it is important to note that Lumos has already paid the make-ready cost estimates provided to it in advance for each pole attachment application. When Lumos subsequently performs the make-ready itself through the use of an

outside contractor, Lumos likewise pays for the cost of this work. However, Lumos does not receive a refund of the upfront monies paid to the pole owner to do this same work. Thus, in some cases, Lumos has paid twice for make-ready work—once to the pole owner for work that was either never performed or never properly completed, and twice when Lumos paid an outside contractor to actually do the work. This is a situation that was apparently overlooked in the *2011 Pole Attachment Order*, but should now be addressed in the context of this NPRM so that attachers are not monetarily penalized by having to pay twice for the completion of the same make-ready work simply because the pole owner failed to adequately complete its obligations under the FCC’s current rules.

As a result, Lumos would propose that if an attacher is required to perform survey or make-ready work by hiring any approved contractor as provided for under current FCC rules, the attacher would provide a notice of completion to the pole owner along with an invoice for the costs incurred by the attacher by the hiring of the approved contractor for the completion of the survey or make-ready work. The invoiced costs would then be reimbursed by the pole owner within 30 days of the date of the invoice, and also offset against the amounts previously remitted in advance by the attacher for the payment of the estimated survey and/or make-ready work cost. The pole owner would likewise be required to true up its actual costs incurred for the survey and/or make ready work, if any, that it completed prior to the attacher’s hiring of an approved contractor. The pole owner shall then issue either a final invoice or refund to the attacher, as the case may be, for the final survey and/or make-ready work cost actually undertaken and completed by the attacher.

V. THE FCC SHOULD ENSURE THAT POLE OWNERS MAINTAIN AN ADEQUATE LIST OF OUTSIDE CONTRACTORS AUTHORIZED TO PERFORM SURVEY AND MAKE-READY WORK AND ALLOW ATTACHERS TO UTILIZE A QUALIFIED INDUSTRY EQUIVALENT CONTRACTOR IF NOT.

Pursuant to 47 CFR § 1.1422(a), the FCC requires pole owners to make available and keep up-to-date a reasonably sufficient list of approved contractors that Lumos can utilize to complete engineering and make-ready if the pole owner fails to do so. As Lumos noted earlier in these comments, the ability to utilize an outside contractor to perform survey and make-ready work not completed in a timely manner by the pole owner was one of the more important aspects of the *2011 Pole Attachment Order*. In at least one instance, however, Lumos has encountered a situation in which a pole owner provided the names of only two such contractors to Lumos, and when Lumos attempted to engage these two contractors to complete overdo make-ready work, the pole owner apparently intervened and forced one contractor to stop the engineering work for Lumos by threatening to cancel the contractor's existing contract with the pole owner.

Although market conditions in individual states obviously differ, Lumos would maintain that a pole owner's list of two approved contractors is not "reasonably sufficient" for purposes of compliance with 47 CFR § 1.1422(a). In order to avoid the type of anti-competitive situation referenced above or another in which utilization of the pole owner's approved contractors is not possible either due to the unavailability or reluctance of the pole owner approved contractors, Lumos would recommend that the attacher be permitted to select an otherwise qualified industry equivalent contractor to perform the work required – whether it be the engineering survey or the actual make-ready work – with notice to but without the consent of the involved pole owner.

The ability of an attacher to employ an outside contractor that may not be listed on the pole owner's approved list, if necessary under certain circumstances, would greatly enhance the ability of an attacher to facilitate the completion of time sensitive broadband deployment projects. In making this recommendation, Lumos would note that the outside contractor utilized under this scenario would be an industry qualified contractor and would still be required to follow the standards established by the pole owner for those working on its poles.

VI. POLE OWNERS SHOULD BE REQUIRED TO PROVIDE DETAILED MAKE-READY COST ESTIMATES AND MAINTAIN STANDARD PRICE LISTS OF COMMON MAKE-READY CHARGES.

In the NPRM, the FCC asks whether it would be prudent to require utilities to provide potential new attachers with a schedule of common make-ready charges to create greater transparency for the assessment of make-ready costs.¹⁰ The current NPRM inquiry runs contrary to the decision arrived at in the *2011 Pole Attachment Order* in which the FCC decided against requiring utilities to provide schedules of common make-ready charges upon request.¹¹ For the reasons noted below, Lumos is strongly in favor of pole owners having to maintain price lists of common make-ready charges, and in addition, Lumos believes that pole owners ought to be required to provide detailed make-ready estimates as opposed to single line invoices.

At present, there is no way potential attachers can effectively resist or dispute pole owner payment demands associated with make-ready cost estimates provided during the pole

¹⁰ See NPRM at Paragraph 33.

¹¹ *2011 Pole Attachment Order* at Paragraph 86.

attachment application process. Given real world time constraints attendant to the provision or expansion of broadband services, providers like Lumos typically have little choice but to pay a pole owner's make-ready cost estimate invoice, no matter how high or unreasonable the charges appear, because the pole owner will not process the attacher's application until this payment is received. In addition to having to pay the pole owner up front regardless of the perceived reasonableness of the make-ready costs involved, attachers face the prospect of even more charges at a later date since pole owners generally reserve the right to adjust estimated make-ready charges afterwards based on "actual" costs incurred.

More importantly, the FCC should require that for any make-ready charges to attachers based on pole owner's costs of performing surveys or make-ready work, pole owners should be required to provide detailed documentation that is sufficient to allow attachers to determine the basis for such charges. Without this kind of make-ready cost detail, which is not routinely provided today or only provided at additional cost, attachers must either pay the make-ready estimates even when they appear excessive or withhold payment while maintaining an outstanding balance in the hopes that the utility will either adjust the charges or ultimately provide adequate documentation justifying the charges. Requiring adequate supporting documentation up front will allow competitors to better monitor work done by utilities on their behalf and hold utilities accountable for any charges that exceed reasonable industry levels.

Far from being something unique, the FCC has previously found that the provision of this type of detailed make-ready invoicing is reasonable. In the case of *Knology v. Georgia Power Company*, the FCC held that attachers have a right to billing detail for make-ready charges, and

further that such detail should be provided at no additional cost to the attacher.¹² Specifically, the FCC's order in this case found in paragraph 61 that "*Georgia Power had an obligation to provide a reasonable amount of information sufficient to substantiate its make-ready and do not view this as an "extra" administrative service for which a separate charge should apply.*"¹³ In short, the FCC held that Knology was entitled to adequate billing back up information in order to evaluate the reasonableness of Georgia Power's underlying charges, and further that Knology should not have to pay for the backup billing information. As a result, Georgia Power was directed by the FCC to provide backup billing information to Knology.

There also is no reason why pole owners cannot maintain schedules or price lists relative to charges imposed by pole owners for field and manhole surveys, record searches, and common make-ready work to protect attachers from arbitrary, excessive and inflated charges. Indeed, the establishment of such schedules for these types of charges would expedite the performance of necessary make-ready while maintaining cost certainty and ensuring non-discriminatory treatment of attachers.

VII. THE FCC SHOULD ENSURE THAT MAKE-READY COSTS AND OTHER EXPENSES CHARGED BY POLE OWNERS ARE REASONABLE AND RECOVER ONLY ACTUAL COSTS

Another aspect of the pole attachment process that could be improved in order to foster broadband deployment involves the proper assessment of make-ready costs. Lumos has

¹² *Knology, Inc. v Georgia Power Company*, File No. PA 01-006, FCC Order No. 03-292 adopted November 14, 2003, released on November 20, 2003.

¹³ *Id.*, at ¶ 61.

encountered situations in which it has been made to absorb the entire cost of survey and make-ready work merely because it happened to be the first attacher requesting access to a certain route or to certain pole lines. As a result of the work done by the pole owner in conjunction with Lumos' initial access request, providers coming after Lumos requesting similar access are not subject to the same level of survey and make-ready costs.

In other instances, Lumos has been made to pay for make-ready work to correct pre-existing deficiencies and substandard conditions that Lumos believes should have rightly been part of a pole owner's regular maintenance activities, which Lumos is already paying for pursuant to the underlying pole attachment agreement. For example, if the pole owner has a pre-existing safety violation which is discovered only when it is required to rearrange its attachment, the new attacher should not be required to pay for the expense of fixing such safety violation. All too often, however, rather than charge the existing attacher for remediation of this safety violation, the pole owner takes the path of least resistance and simply charges the new attacher. In order to remedy this practice, the FCC should mandate that pole owners notify an existing attacher when its improperly placed attachment is preventing a new attacher from attaching on the pole and, if neither the existing attacher nor the pole owner fixes the error within 10 days, permitting the new attacher to correct the violation through the use of an authorized outside contractor and bill the existing attacher for resolution of the non-compliant attachment.

Either scenario is clearly contrary to existing Commission policy, as evidenced by the Commission's resolutions of past disputes.¹⁴ Yet, pole owners' continuing recalcitrance with

¹⁴ This practice is clearly contrary to existing Commission policy. See *Knology, Inc. v. Georgia Power Company*, Memorandum Opinion and Order, 18 FCC Rcd 24615 ¶ 37 (2003) ("[I]t is an unjust and unreasonable term and

regard to this requirement clearly indicates that adjudication alone does not suffice to produce adequate deterrence. As a result, both of these survey and make-ready billing issues need to be addressed through pertinent modifications made to the current pole attachment rules.

Additionally, Lumos has found that certain pole owners drive up costs by billing entities seeking new attachments for the make-ready costs of moving existing 3rd party attachments on their poles, while the pole owner then notifies the owners of these existing 3rd party attachments that the 3rd party must perform this make ready-work. Thus, the pole owner reaps an undeserved monetary benefit by billing the newly attaching entity for all make-ready work, while at the same time shifting the actual work completion to the existing attached 3rd party entities.

In this situation, the pole owner can get away with this practice simply by omitting the name of the newly attaching entity from their make ready notice to the existing 3rd party attached entity. The existing 3rd party attached entity has no idea who is generating the make ready work, and will oftentimes assume this work is due to maintenance the pole owner is doing for its own purposes. It is also important to note for purposes of this discussion that most pole attachment contracts do not allow 3rd party attached entities to be compensated for work that the pole owner does for their own purposes.

This practice also allows the pole owner to inflate the cost of make-ready to be paid by the newly attaching party. For example, an ILEC/pole owner in one of Lumos' current operating

condition of attachment, in violation of section 224 of the Act, for a utility pole owner to hold an attacher responsible for costs arising from the correction of other attachers' safety violations."); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 ¶19 (1999) ("Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner's attachment to keep the pole within NESC standards should be borne by Time Warner.").

jurisdictions will routinely bill a newly attaching party for cable movement work at a rate 800% higher than would have otherwise been paid had the newly attaching party directly paid existing 3rd parties to move their cables to accommodate the new attachment. Undoubtedly, this type of practice is neither just nor reasonable and should likewise be addressed in this proceeding through appropriate adjustments made to the FCC's current pole attachment rules.

VIII. CONCLUSION

For all of the foregoing reasons, Lumos Networks respectfully requests that reforms to the FCC's current pole attachment rules recommended herein should be adopted.

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